

CHAPTER 4 - PRE-SOLICITATION ADMINISTRATION AND DETERMINATION

4-1. General. (29 CFR, Part 4; FAR 22.1008). It is essential that all prospective procurements be assessed in terms of the potential applicability of the various labor standards statutes referenced in Chapter 2 of this pamphlet. Further, it is recommended that such determinations be undertaken as early in the procurement planning process as may be practicable. Experience has indicated that where the determination of the appropriate labor standards statutes and provisions are an addendum rather than an integral element within the procurement planning process, the potential for disruption of solicitations and contract schedules is significantly increased. This is particularly true with respect to service contracts where the timing and content of SCA wage determination request procedures differ from those arising under the DBA.

4-2. Standard Form 98/98a, Notice of Intention to Make a Service Contract and Response to Notice.

a. For any contract exceeding \$2,500 which may be subject to the SCA, the contracting agency is required to submit The Notice of Intention to Make a Service Contract -- Standard Form 98 (Appendix E). The individual SF 98 consists of two forms, the SF 98 and SF 98a, and any supporting documentation required. The request is sent to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. Supplies of the SF 98 and 98a are available in all GSA (General Services Administration) supply depots under stock numbers 7540-926-8972 and 7540-118-1008, respectively. Alternatively, the DOL has authorized the use of a computer-generated SF 98 and SF 98a, provided such forms continue to maintain separate and unique notice numbers for each request. Towards this end, the DOL has authorized the Corps to use the prefix "C" for each request and the first two numbers representing the Corps district from which such request originates. (For example, C2598001 would represent a request from the Corps of Engineers Rock Island District). It should be noted that such format is merely an option with each district and districts may elect to continue to use the GSA supplied forms.

b. There are three types of SF 98/98a Notices sent to DOL:

(1) Individual Requests for Area, or locally prevailing, WDs: Area WDs reflect wages and benefits which DOL determines to be prevailing for a specific locality (usually determined from Bureau of Labor Statistic surveys and other data). Individual requests are also submitted when the incumbent or predecessor contractor employees are subject to a CBA, and that CBA is forwarded to DOL requesting a WD reflecting the CBA rates and benefits.

(2) WDOL Program Requests: Under the new program, described in greater detail in Chapter 5, the contracting agency selects the appropriate Area WD for a contract action from an on-line subscription service, and then submits an SF 98/98a Notice to DOL informing DOL of the contract action and WD selection. A separate SF 98 Notice must be submitted to DOL for each contract action. Proper use of the WDOL Program SF 98 requirement satisfies the regulatory notice requirement under 29 CFR 4.4 and FAR 22.1008.

(3) Blanket WD Program Requests: One annual SF 98 is submitted to DOL for all one-time or recurring, continuous or multi-year services for a specific contracting activity. DOL responds to this request with "Area WDs" (also known as "Blanket WDs"). This program is detailed in Chapter 6. If a contracting activity requests authorization to participate in the WDOL Program, they should no longer participate in DOL's Blanket Program.

4-3. Notice Requirements and Timing of the Request. (29 CFR 4.4, FAR 22.1008-7) For all SCA request actions other than those under the WDOL program (see Chapter 5), the SF 98/98a and any required supporting documentation must be submitted to the Wage and Hour Division for recurring or known procurement needs not less than 60 days (nor more than 120 days except with the prior approval of the Wage and Hour Division) prior to any invitation for bids; requests for proposals; commencement of contract negotiations; exercise of options or contract extensions; annual anniversary date of multiple-year contracts subject to annual appropriations of the U.S. Congress; or biennial anniversary date of multiple-year contracts not subject to annual appropriations of the U.S. Congress, unless otherwise advised by the Wage and Hour Division. For unplanned or non-recurring procurement needs, individual SF 98 requests must be submitted as soon as possible, but not later than 30 days prior to the above listed contractual actions. (See 29 CFR 4.4) There may be, of course, situations where exceptional circumstances prevent the submission of the request within the time periods noted above. In an emergency situation requiring an immediate wage determination response from the DOL, the CO shall coordinate such request with the HQUSACE Labor Advisor (CECC-C), as provided by DFARS 22.1008-7(d).

4-4. Content of the SF 98. The SF 98 specifies the relevant procurement dates, the geographic location of the work to be performed, the type of services to be covered by the contract, and provides information on incumbent contractors, previous wage determinations, and collective bargaining agreements that may apply. The SF 98a identifies the occupations (classes) of service employees to be

employed under the SCA-covered contract, the number to be employed, and the hourly wage rates that would be paid if such workers were Federal direct hires. The SF 98 includes instructions for proper completion. While all requested information is important for the proper issuance of the wage determination, certain items are critical, as noted in paragraphs a through e below.

a. Procurement Dates (SF 98, Blocks 2,3,4). Procurement dates are important for evaluating the timeliness of requests and the Wage Determination (WD) response issued by the DOL. In addition, these dates are important to the evaluation of the currency of data sources to be used in developing the WD and the proper tracking of annual vs. multi-year service contracts. It is noted that for multi-year contracts not subject to annual appropriations, a written statement describing the type of funding and anticipated term of the proposed contract must be attached to the SF 98 request. As discussed in paragraph 4-3, this type of multi-year service contract requires a new wage determination issuance at least every two years.

b. Place(s) of Performance (SF 98, Block 5). Listing the city, county, and state of the location(s) where the services called for will be performed is important to the development of the WD. It is particularly important to list the county inasmuch as the DOL indexes its wage determinations by county. The failure to include the county may delay the DOL's response. Prevailing, area-wide WDs are based on wage rates and fringe benefits determined to be prevailing within the locality of the place of performance. The place of performance could be the contractor's site, a government installation, or elsewhere. Where the place(s) of performance of an SCA- covered contract is unknown at the time of solicitation, bid specifications may be issued without a WD. Under these circumstances, a two-step solicitation process may be used. In the first step, the contracting agency will issue an initial solicitation with no WD, from which it identifies all interested bidders or offerors and their possible places of performance and then transmits this information to DOL with the SF 98. In the second step, DOL will issue separate WDs for the various localities identified in the first step, to be incorporated in the solicitation prior to the submission of final bids or offers. The appropriate WD applicable to the geographic location of the successful bidder shall be incorporated in the resultant contract and shall be observed, regardless of whether the contractor subsequently changes the place(s) of contract performance. For unusual situations where this two-step procedure may not be practical, the matter should be brought to the attention of the District Labor Advisor for coordination with CECC-C and the DOL.

c. Services to be Performed (SF 98, Block 6). A clear and complete description of the type or

1 Aug 01

types of services called for by the procurement is essential to the DOL staff in addressing the request. If the services to be provided are unusual in any way, a detailed description may be necessary. Inadequate or an incomplete description of services to be performed may result in delays in the furnishing of wage rates by the DOL.

d. Information about Performance (SF 98, Block 7). Identification of the status of the procurement provides information relating to several important considerations that affect the DOL response. These considerations include the following.

(1) Box A - Services Now Performed By a Contractor: Checking this box indicates that the procurement is recurring. Depending upon the procurement dates, the contract may be an annual, recurring contract or a continuous, multi-year contract. Also, a contract that is currently being performed by a contractor will have a previously issued WD on file that will be evaluated by the DOL as part of the WD development process.

(2) Box B - Services Now Performed By Federal Employees: Checking this box indicates that the contracting agency is considering whether to contract out for services currently being performed by Federal workers in accordance with Federal policy established by OMB Circular No. A-76. This policy establishes the principles and procedures used by agencies in determining whether a given Federal Government service is better provided by a commercial source in order to achieve economy and enhance productivity. A decision to contract with a commercial source may result in a displacement of Federal workers which is taken into account as part of the WD development process. Checking this box also indicates that there does not currently exist a previously issued WD for the procurement action.

(3) Box C - Services Not Presently Being Performed: Checking this box indicates that the procurement is a completely new service not currently performed by Federal workers or contractors. A previously issued WD will therefore not exist.

e. Collective Bargaining Agreement (SF 98, Block 8). Under the Act, the DOL is required to issue two types of wage rate determinations. "Prevailing Rate" wage determinations are issued for contracts where there was no predecessor contractor or where the predecessor contractor's wage rates were not governed by a collective-bargaining agreement (CBA) during the term of the contract. However, the Act has specific protections for employees performing service contracts under CBA's. Section 4{c} of the Act provides that a contractor performing substantially similar services in the same location as a

predecessor contractor must pay at least the same rates as the predecessor contractor was obligated to pay under his CBA. Under these conditions, therefore, the DOL will issue "Collectively Bargained Rate" wage determinations. In every recurring procurement of services, the contracting officer must determine whether some or all of the incumbent contractor's employees have their wages and fringe benefits set in a CBA (see FAR 22.1008-3). If a CBA applies to the incumbent contractor's workforce, the CBA sets the minimum rates for the successor contract period by operation of law (41 USC 353(c); 29 CFR 4.163(b)). The CO must obtain a copy of the applicable CBA and submit it to the DOL as an attachment to the SF 98/98a for the successor procurement. Further the contracting officer must give the union and the contractor written notice of the relevant procurement dates (see FAR 22.1010).

4-5. Content of the SF 98a.

a. Occupational Classes and Number of Employees (SF 98a, Blocks 12 and 13). The SF 98a must list the classes of service employees expected to perform the services called for by the proposed SCA-covered contract, and where applicable, any subcontracts. The listing of all occupational classes of service employees to be employed under the proposed contract must utilize job titles and corresponding code numbers found in the Directory of Service Contract Act Occupations, a U.S. Department of Labor, Employment Standards Administration publication. (This publication is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.) Since payroll titles and work assignments vary among contractors and geographic areas, the directory serves as a standard means of communication among contractors, contracting agencies, and DOL wage determination staff. For any occupation not contained in the directory, an appropriate job title shall be given in Block 12 and a job description must be attached to the SF 98. The WD issued by the DOL will include the minimum wage rates and fringe benefits to be paid by the contractor for occupational classes listed in the SF 98a to be used in the performance of the SCA-covered contract. An occupational class is classified according to duties, skills, knowledge required to perform it. Such factors affect the job's relative rate of pay. Occupational classes vary considerably with regard to these factors. Wage rates therefore vary considerably by class. Thus, job descriptions are evaluated by DOL staff to determine appropriate classifications (and respective relative pay rates) for evaluation against survey or other related data used to develop the WD. The number of service employees expected to be employed in each occupational class or a statement that the total number for all classes will exceed five must also be included in the SF 98a.

b. Comparable Federal Rates (SF 98a, Block 14). The hourly wage rates or grade levels that would

1 Aug 01

be paid if workers were Federal direct-hires must be listed in the SF 98a. Wage rates for white-collar classes are established by the Federal General Schedule (GS rates and grades). Wage rates for blue-collar classes are established by the Federal Wage System Schedules (Wage Board or NAF rates and grades). These comparable pay rates or grade levels are used to apply the principles of due consideration required by section 2(a)(5) of the Act. Comparable Federal fringe benefits need not be in the SF 98a. All Federal employees, regardless of occupational class, receive the standard Federal fringe benefits package. The level of benefits so provided by law and regulations at the time of the procurement is used in the application of due consideration, if necessary.

4-6. Service Contract Administration Issues. Due to the complexity of the regulations implementing the Act, it would be impossible to consider all potential problems in the pre-solicitation and pre-award phase of service contract administration. However, noted below are some of the more problematic issues that have arisen in recent years.

4-7. Certified Listing of Employee Anniversary Dates. In the case of a contract performed at a Federal facility where employees may be retained by a succeeding contractor, DOL's regulations (29 CFR 4.6(1)(2)) provides that the incumbent prime contractor must furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract (with the incumbent as well as predecessor contractors) of each employee, to the contracting officer not less than 10 days before contract completion. A copy of this list is to be provided to the successor contractor for determining employee eligibility for vacation fringe benefits which are based on length of service with predecessor contractors (where such benefit is required by an applicable wage determination). Failure to obtain such employment data will not relieve a contractor from any obligation to provide vacation benefits (see also FAR 22.1020).

4-8. Successor Contractor Obligations. There are special requirements for both contractors and contracting agencies under the SCA in connection with recurring service contracts. Specifically, the Act requires a new contractor who replaces a contractor subject to a collective bargaining agreement with a union to pay its employees not less than the wage rates and fringe benefits that its predecessor would have had to pay under the most current collective bargaining agreement, including any prospective increases provided for in the agreement (see 41 USC 353(c); 29 CFR 4.163(b) and FAR 22.1002-3). This provision is self-executing and imposes an absolute duty on the successor contractor, regardless of the contractor's knowledge of the predecessor's collective bargaining agreement. There are certain conditions under which this requirement would not apply and they are set forth below:

a. If the successor contract is not to be performed in the same locality as the predecessor contract,
or

b. The DOL determines after a hearing that the wage rates and fringe benefits in the collective bargaining agreement are "substantially at variance" with those prevailing in the locality for similar services;
or

c. The DOL determines that the predecessor's wage rates were not agreed to in an "arm's length" transaction.

d. "Contingency Clause". The DOL has determined that CBAs which contain increased wage and fringe benefit provisions which are contingent on a number of factors (but principally, upon approval by the DOL's Wage and Hour Division) do not satisfy the criteria for the establishment of successor contractor obligations under section 4 (c). FAR subparts 22.1002-3, 22.1008-3, and 22.1021 have been revised to implement the guidance previously furnished by DOL on these issues within All Agency Memoranda 159 and 166. All Agency Memorandum No. 159, for example, provides that regardless of any contingency clauses contained within a predecessor contractor's CBA, a copy of the CBA must be submitted with the SF 98 wage determination request to the DOL. The determination as to whether the CBA has application for section 4{c} purposes is to be made by the DOL, and not the contracting agency.

COs and their representatives need to be aware of the above successor contractor obligation as well as the conditions which alter its applicability insofar as it may affect certain solicitations. The contracting agency or any other person affected or interested, including contractors, and employee representatives, may request a determination by the DOL on these issues. COs are reminded that FAR subparts 22.1012-3 and 22.1012-5 authorize the incorporation of the wage and fringe benefit terms of the CBA, or the CBA itself, in order to facilitate price adjustments for options in fixed-price type contracts.

4-9. Substantial Variance. Requests for a DOL "substantial variance" hearing or "arm's length" determination involve the use of Administrative Law Judges (ALJ) in accordance with the DOL's regulations. For either type of request, information must be submitted (in accordance with 29 CFR 4.10 and 4.11) as follows:

1 Aug 01

- a. Prior to 10 days before contract award, if an advertised contract; or
- b. Prior to the contract or option period start date, if a negotiated contract, or existing contract with an option or extension period.

Requests for DOL determinations under these regulations should be forwarded to the District Labor Advisor for coordination with CECC-C.

4-10. DOL Responsiveness. The issue of DOL responsiveness to contracting agency wage requests has received considerable attention in recent years. Information furnished by the DOL indicates that the Branch of Service Contract Act Wage Determination receives in excess of 55,000 requests for SCA wage determinations annually. These requests are processed by a DOL staff of less than 20 employees. Thus, there is a considerable demand upon the DOL to process these requests notwithstanding either the complexities or the urgency of such requests. In this regard, the DOL has furnished data which indicates that contracting agencies fail to comply with the time and notice requirements (see Section 4-3) for over 50% of all SCA wage requests. Moreover, delays in DOL responses are frequently the result of the failure to properly complete the SF 98/98a.

- a. DOL's Wage Determination Automated Tracking System. In order to track the status of its SCA wage request processing, the DOL established a Wage Determination Automated Tracking System (WD-ATS) which provides information with regard to the date the DOL has received the individual request, the date it is due back to the requesting contracting agency and its current status within the DOL's system. COs are encouraged to contact the DOL's status line (202-219-7096) in order to confirm that the request has been received. Such action is particularly appropriate in view of the notice requirements noted previously (see paragraph 4-3).

- b. The WD-ATS is operated and maintained by contract personnel rather than DOL staff. The WD-ATS contract personnel are not authorized to either answer questions with respect to the applicability of the Act or to expedite particular wage requests. All questions concerning the applicability of the Act, requests for immediate wage determination responses for emergency acquisitions and all notifications concerning solicitations adversely affected, i.e., delayed due to the lack of a DOL response, are to be coordinated with CECC-C (see FAR 22.1003-7, 22.1011-2, 22-1012 as well as DFARS 222.1003-7 and 222.1008). Inquiries may be directed to the HQUSACE Labor Advisor by means of e-mail (gregory.m.noonan@usace.army.mil) or by Fax (202-761-4123). Such inquiries should be

addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor and include the following information:

- (1) SF 98 Notice Number
- (2) Date submitted to the DOL
- (3) Services to be performed
- (4) County or Counties where services are to be performed
- (5) State
- (6) Date SF 98 was received by the DOL
- (7) Date indicated by DOL for response
- (8) Impact of delay upon procurement

Information provided in accordance with the above will be recorded by CECC-C for transmittal to the Chief, Service Contract Wage Determinations Branch, U.S. Department of Labor.